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CURRENT TOPICS.

It has always been considered paradoxical that the strict enforcement of the law should afford the greatest encouragement for the violation of it; yet that such is the consequence is too evident to be disputed. In other words, the greater the pains which courts have taken to secure to men what they are pleased to term their legal rights, the more flagrant has become the popular disrespect for the mandates of the law; and for its seeming justice. But the courts are themselves responsible for this. The people are bound that justice shall be meeted out to those who deserve it, in the manner which their notions dictate, when there has been a miscarriage in the courts. They are determined that crimes shall not go unpunished, even if they are obliged to take the law into their own hands. This notion has become so deeply impressed upon the minds of the people of many States that it seems strange that judges have not become so impressed with the cause of it, as to make every effort to remove it. When "lynch" law was in its embryo, and the courts saw that it was their technical rules which brought it into life, then was the grand opportunity to crush it, by throwing aside their veneration for the precedents of ancient criminal pleading, and planting themselves upon the new platform of modern ideas of law and justice. The popular forum would have crumbled in its infancy; no more would its judgments have sent a thrill through the veins of the people of the old conservative States; their unfavorable ideas of the civilization of their sister States would have faded away, before they assumed tangible shape. But some courts are not wise. They delight in making widespread reputations; they crave for public attention; and they render decisions which will seem startling in their absurdity, and cause universal comment and bring them notoriety. The highest courts of Texas, Maryland and Indiana have lately rendered decisions which have induced these comments, and they certainly have not created in our minds a more favorable opinion of their ability, if they have indeed in the minds of anyone. In Texas, the defendant in Hewitt v. State, was charged with having "with force and arms in and upon the body of Ellen B, made an assault" and that "her, the said Ellen B, then and there did wound and ill treat, with the intent then and there the said Ellen B, against her will and without her consent then and there feloniously to rape and carnally know." This indictment was quashed because "it did not describe the offence to-wit, rape" intended to be committed. "The indictment," the court says "must charge all the elements of the intended offense." We do not claim that this may be not justified by the old precedents, but can it be said to be expedient upon this pretext to dismiss a man from court and turn him over to the mob, which is clamoring for vengeance? The whole theory upon which the interpretation of indictments is founded is that the indictment should properly inform the prisoner as to the charge he must answer and must contain the elements of certainty, sufficient to enable him to satisfy a court and jury in any subsequent prosecution for the same offense, that he has been once in jeopardy. Does not every intelligent citizen know the meaning of the word "rape?" It is true that certain elements are necessary to constitute the crime of rape; the same might be said of assault; so it always is a question of law whether certain acts or words amount to promise; yet can even the Texas Court of Appeals claim that the presence of the word "promise" in an indictment would be fatal to it? If the accused had been acquitted upon the indictment, and been subsequently prosecuted for the same offense, could he not have clearly demonstrated to the court by the record itself that he had been once placed in jeopardy for having ravished the prosecutrix? But let us pass on.

In the Indiana case, Straden v. State, the accused was charged with having upon a certain date, "upon one Addie Young, a female child under the age of twelve years, unlawfully, feloniously and forcibly made a violent assault upon her, the said Addie Young, then and there unlawfully and feloniously did ravish and carnally know." This was held insufficient because there was no word used whereby a conjunctive connection was established between the charging part of the affi

davit, and what preceded it. "It does not charge," to use the words of the court, "that the appellant, ravished or carnally knew Addie Young, or any other specifically named person, and as an independent or disconnected part of a sentence, it is fatally uncertain." How the defendant could have made an assault upon Addie Young, "with intent to ravish" some other person "not specifically named," is something beyond our powers of comprehension, but the Indiana judges must have had some method in their minds, which was employed by some one whose identity was "fatally uncertain." Every one knows the crime, the criminal, and the person upon whom the crime was committed, from this affidavit, and any court before which the accused might afterwards be taken, could readily see the identity of the charges. No manner of twisting language could be available to charge the offense in a subsequent indictment, which could create a doubt in the court's mind as to the identity of the crimes. The Maryland case assumed a somewhat different form. Under the Maryland law, which is practically universal in this respect, the jury are required in rendering their verdict in a murder case, to designate the degree of which they find the accused guilty. In Williams v. State, the response of each juror to the query of the clerk was that the accused had been found "guilty," whereupon the clerk added: "Hearken to the verdict as the court has recorded it—your foreman saith that J. W. the prisoner at the bar is guilty of murder in the first degree, and so say you all," to which the jury made the usual nod. This verdict the court held to be a nullity, because in the first instance, the degree had not been named. The jury could not adopt the clerk's language as their own. We have said enough. We leave it to our readers to draw their own inferences. We entertain the highest respect for the forms of law, and believe that they should be adhered to. We are not in favor of obeying the demands of the mob; but we are opposed to anything which will incite the mob to violence. Courts are established to frame rules to meet the necessities and conveniences of the people. for whose interest they were created. The times, the manners of the people, their feelings and their passions, should determine the character of such rules. What serves the end of conservative old Brittania, does not serve us. A new country needs progressive rules, and as things become established, a relaxation is in order. Recognition of these trivial objections should cease. It was said by one of England's greatest judges, that "it was fortunate for the people that a seventeenth volume of Meeson & Welby had not appeared, for, if it had, the common law would have disappeared from the realm, amid the universal jeers of mankind." If the reign of technical law flourishes much longer, the same fate may befall our criminal jurisprudence.

The Supreme Court of California treated with very little ceremony the case of Robb, which has achieved its importance chiefly by the size of the brief which the petitioner's counsel has scattered through the country. Robb was the agent of the State of Oregon, to receive a prisoner who had been apprehended upon a warrant in obedience to a requisition from the Governor of that State upon the Governor of California. He was ordered to appear before the State court with his prisoner, to show upon what grounds he sought to detain him. He made return that he held custody of the prisoner by force of the Federal Constitution, and was therefore not amenable to the State courts, and refused to obey the writ. He was thereupon committed for contempt, and the Supreme Court sustained the committal. Thereupon Robb filed his petition for release in the Federal Court, and Judges Sawyer and Sabin, relying upon *Ex parte* Smith, 3 McLean 129; Prigg, 16 Pet. 539; Albiman v. Booth 21 How. 507, held, that after the State court was judicially apprised that the prisoner was held under a requisition it could proceed no further, and the committal was unauthorized. It certainly seems reasonable that the courts of a State should not be bound to accept the mere verbal assurance of one who is depriving a citizen of the State of his liberty, as to his authority to do so but, as the Supreme Court of the United States has seemingly held the contrary, we must bow to its edict.

COSTS IN WILL CONTESTS.

"Parties to will contests must pay their expenses out of their own pockets," was the gruff reply of the Supreme Court of Pennsylvania[1], to the request of a poor man who had been unsuccessful in his attempt to secure probate of the instrument, which he in good faith, believed to embody the last wishes of his deceased friend, as if common sense and natural justice did not sanction a contrary conclusion to that taken by the court. This remark met our gaze some time since, but excited no special interest until the Supreme Court of California some weeks ago, assumed courage enough to follow in the wake of the Pennsylvania judges;[2] and when we observed that the Kentucky Court of Appeals recently freed its conscience by gladdening the heart of an executor in the same difficulty,[3] we determined to probe the matter to the bottom and we now give our readers the benefit of our investigation.

Will contests may turn (1) entirely upon a question of fact, when the execution of the will or mental capacity of the testator is disputed or (2), upon a mixed question of law and fact, or (3) entirely upon a question of law, *e. g.*, when the testator has employed language of such an ambiguous character as to leave in doubt, without the sanction of the proper tribunal, the appropriate disposition of the property. At common law the only proceeding in which the validity of a will could be questioned was by an issue of *devisavit vel non*, in the action of ejectment. Will contests were also carried on in the ecclesiastical courts, where everything was done in accordance with equitable notions of justice. In these contests, were usually four parties of different interest; (1) the executor, who is in duty bound to act upon the presumption that all things are done properly, and to present for probate the instrument which to all outward appearance is the last will of his friend, appointing him to carry out his dying wishes; (2) the general legatee, whose good fortune depends upon the validity of the will, and who is entitled to act upon the same presumption—and therefore, to assume that the legacy is his property, for which he has the constitutional right to contend; (3) the residuary legatee, who after all debts and charges upon the estate, have been satisfied, receives the "leavings;" and (4) the heir, who though designated by the law, as the successor in ownership of the property in litigation is charged with having been given but a slice of comfort by the testator, or with having been "left out in the cold" altogether.

All these parties have rights and duties. With rebellious children often, on the one hand, seeking to subvert the will of their father who has taught them, by the terms of his last testament, the penalty of disobedience; and still oftener, with intriguing strangers taking advantage of the physical and mental weakness of a dying man, and by importunity and other undue influence, extorting from him a will, which violates the obligations which he is under to others, it has always been thought good policy to encourage all parties to vindicate their rights. To do that properly, counsel must be employed, witnesses procured, and other costs incurred. In the event of failure which must result to one or more of the parties, who must pay the expenses? Must every one pay his own costs as the court of Pennsylvania would have it, or must the estate relieve all parties of their burdens? Suppose the heir fails; must he pay not only his own, but the costs of all his adversaries, the prevailing parties? The law favors intestacy, it has been often said. Not until after the passage of the Statute of Wills[4] could men, in theory, disinherit those whom the law designates as their successors. Since the enactment of the Statute of Frauds,[5] it has been that only by a strict compliance with the formalities therein prescribed, can that succession be defeated, and the right of disinhersion availed of; the presumption of law is in favor of the heir; the burden of proving such strict compliance has been thrown upon him who claims its benefits. So long as the right of inheritance continues, the privilege of contesting the will of his ancestor is one of the constitutional privileges of the heir, which no legislature can take away. He, in good

[1] Deitrich's Appeal, 2 Watts (Pa.), 332; Mumper's Appeal, 3 W. & S. 441.
[2] Estate of Maury, 12 Pac. Coast L. J. 300.
[3] Phillips v. Phillips, Ky. Ct. App. dig., 18 Cent. L. J. 89, decided November 20, 1883.
[4] 32 Henry VIII., cap. 1.
[5] 29 Car. II., cap. 3, sec. 5.
[6] Bennett v. Bradford, 1 Coldwell (Tenn.), 472; Leavenworth v. Marshal, 19 Conn. 417; Clipp v. Fullerton, 34 N. Y. 199.

faith, contends that the property purporting to have been disposed of still belongs to him; the apparent devisee, with equal honesty contends that the title to the same is in him; a contest ensues; upon whom and what must the burden of expense fall?

The Rule as to the Executor.—When the executor has been successful, barring two States, the universal course has been to allow him, out of the fund in his custody, all the expenses which he has legitimately incurred to uphold the will.[6] As was declared in one case,[7] "it was his duty to propound the will for probate. He was acting for all the legatees under the will, and this was his duty, whether he had any interest or not. He was under obligations, if he did not renounce, to take all proper steps and incur any necessary expenses, to sustain the will and faithfully carry out the trusts imposed upon him. If, in doing this, he had to employ counsel, it would be most unreasonable to throw the burden upon him individually, when he was acting for the benefit of others, and in the discharge of his duty as their representative." But in denying the claim of a successful executor for reimbursement, the Supreme Court of Georgia reminded him that "the interests or the next of kin, in cases of intestacy accrue by mere operation of law," and that "they have the plainest right to be satisfied that these interests are not defeated but upon good and sufficient grounds." [8]

When unsuccessful, the executor has been equally fortunate in securing reimbursement.[9] "The costs in this case," it was said upon one occasion, "were incurred in consequence of the act of the testator, and it was the duty of the executor named in the will offered, to maintain its validity." [10] But if the court finds that he offered the will in bad faith, it will decree that he pay the costs of all parties.[11] But the general rule prevails, even though he be a large beneficiary under the will.[12] In Ohio, it has been held that an executor has no just claim for reimbursement, on the grounds that he had no interest in sustaining the will; that pecuniarily he was a stranger thereto, and he should have left the contest to be fought by the heirs and legatees; that his intrusion was entirely officious; that the will having been disestablished, things were in the same condition that the undisputed intestacy would have left them, and that the whole estate belonged to the heirs, free from all charges except those created by the testator himself.[13] And in Pennsylvania, after dismissing a successful executor without consolation, the court made the suggestive inquiry, "Suppose it had been decided against him, does any one imagine that he could retain out of the estate, not only his costs, but his counsel fees?" [14] The current opinion is that that is his privilege.[15]

As to Heirs and Legatees.— The better opinion, and certainly that sustained by the great weight of authority, is that when the will is sustained, the residuary legatee must pay the expenses of both parties, including counsel fees, and when the will is overthrown, that the successful heirs must furnish the unfortunates, who supposed themselves to be legatees, with sufficient consolation to restore their purses to their pristine vigor. But to obtain this reimbursement, the unsuccessful party must have carried on the litigation in good faith, and with entire confidence in the justice of his opposition, and not with the mere hope of forcing a compromise or proposition from the other side.[16] "It would ap-

[7] Bennett v. Bradford, *supra*.

[8] Varney v. Goldsby, 22 Ga. 304, citing Eng. Eq. Rep. 425; 1 Eng. Ecc. Rep. 185.

[9] Henderson v. Simmons, 33 Ala. 391; Gilbert v. Bartlett, 9 Bush. 49; Sterlin v. Gross, 5 La. 107; Butler v. Jennings, 8 Rich. (S. C.) Eq. 89; Brown v. Rogers, 1 Houston (Del.) 458; Gerard v. Babineau, 18 La. Ann. 603; Smith v. Kennard, 38 Ala. 703; Boylan v. Meeker, 2 McCart. (N. J.) 3 0: Perrine v. McDonald, 1 Id. 531, 136; Clapp v. Fullerton. 34 N. Y. 199; Conley v. McDonald. 40 Mich. 150; Day v. Day, 3 Gr. Eq. (N. J.) 364; Whitenalk v. Stryker, 1 Ib. 9; Davies v. Ries, 13 L. T. (N. S.) 699; Boulton v. Boulton, 37 L. J. 19; Toole v. Tretheway, 4 H. L. 201. But compare Nash v. Yellowby, 3 S. & T. 59.

[10] Sterlin v. Gross, 5 La. 107.

[11] Seamen's Friends Society v. Hoppe, 33 N. Y. 619.

[12] Boylan v. Meeker, 15 N. J. Eq. 310.

[13] Andrews v. Andrews, 7 Ohio St. 143, citing Bailey's Eq. 460; Mumper's Appeal, 3 W. & S. 441; s. c., 13 Pa. St. 569.

[14] Mumper's Appeal, 3 W. & S. 441.

[15] *Supra*. But the contrary opinion seems to be held in Connecticut. See Curtiss v. Northrup, reported in Swift's Evidence; Leavenworth v. Marshall 19 Conn 17.

[16] Clapp v. Fullerton, 34 N. Y. 199; Conley v. McDonald, 40 Mich. 150; Day v. Day, 3 Gr. Eq. (N. J.) 364; Whitenack v. Strycker, 1 Gr. Ch. 9; Jackman's Estate, 26 Wis. 144; s. c., Ib. 364; Brooks v. Chappell 34 Wis. 419; Downie's Will, 42 Wis. 66, where the legatee was the unsuccessful party; Dodge v. Williams, 46 Wis. 70; Cole's Will, 49 Wis. 185; Baker v. Baker, 51 Wis. 538; Robbins v. Dolphin, 1 S. & T. 518; Thorncroft v. Lashnear, 2 Ib. 479; West v. Goodrick,

pear to be in accordance with the ordinary principles of justice, and likewise in harmony with the practice in cases of this character," it was said in a Wisconsin case, "to order that the costs of the litigation should be paid out of the estate." [17] And where the contestant obtains a verdict in the trial court, although it is reversed by the appellate court, such recovery is sufficient evidence of good faith.[18] So the fact that the question raised has never been decided in the State, is a sufficient guaranty of the honesty of purpose of the contestant.[19] So, if the will is executed entirely in favor of strangers, when no one but the beneficiaries is present, and the heiress is denied access to the room where the testratrix is lying, her good faith in contesting the will is established.[20] And even though the opposition is groundless and without probable cause, yet if the contestant rushed into it blindly and honestly, he will be allowed his costs.[21] Say the court in the case last cited: "Holding, as we do, that there was no legal ground for resisting the probate of the will, and scarcely any probable cause for such resistance, and that such appeals ought not to be encouraged by the allowance of costs out of the estate, yet in tender consideration for the evident good faith of the contestant, and of her firm belief that the will of her father had been unduly influenced by her brother William, and of her painful disappointment in not realizing her expectations, we think her taxable costs in this court may properly be paid out of the estate."

But if it appears that the contest was begun with a bad motive, the court will disregard the circumstances and adjudge that all the costs be paid by the contestants. Thus if the contestant put the executor to an expensive trial after she receives from him complete information in regard to the execution of the will the fact that it was made under remarkable circumstances will not entitle her to relief.[22] So, where the heir obtained an issue to try the validity of the will after it had been established, to his knowledge, as to the personalty, in the ecclesiastical court, his bad faith was so apparent, that he was subjected to the payment of all the costs of his adversary.[23]

The result of these cases establishes the fact that the whole question of costs, as well as the amount thereof, outside of statutory provision, is to be decided by the court in the exercise of its equitable powers, governed by the circumstances of each case and the motives of the parties. But under such statutes as the legislatures of Wisconsin and Michigan have enacted, the costs include only statutory costs, which do not embrace counsel fees.[24] These statutes merely confirm the discretionary power of the courts, which prior to their passage existed, but it has been held that the word "costs" was employed with reference to its meaning as it appeared throughout the statutes, and thus the old rule was superseded.[25]

The Modern Rule.—The gravest question to be considered is as to the effect which those statutes which provide that "the prevailing party shall, in all proceedings, recover his costs against the losing party" have upon the old rules. At first blush, it would seem paradoxical to allow a losing party in a will contest, his costs out of the estate of the prevailing party, when the statute provides that the latter shall have his costs against the former. This objection is met by the claim that this allowance is in no sense taken from the estate of the prevailing party, but is a charge upon the estate of the decedent which he, by the peculiar manner in which he made

31 L. J. 39; Mitchell v. Guard, 3 S. & T. 275; Williams v. Henry, Id. 471; Davis v. Gregory, 3 L. R. 28; Boughton v. Knight, 42 L. T. 41; DuBuison v. Maxwell, 28 L. T. (N. S.) 369; Orton v. Smith, 3 L. R. 23; Critchell v. Critchell, 3 S. & T. 41; Bewsher v. Williams, 3 S. & T. 62; Swinfen v. Swinfen. 29 L. J. p. 153; S. C., 1 S. & T. 283; Smyth v. Wilson, 36 L. J. 82; Hooten v. Dennett, 17 L. T. (N. S.) 670; Mitchell v. Guard, 12 W. R. 254; S. C., B. S. & T. 276; O'Kelly v. Browne, 9 Ir. R. Eq. 353; Tann v. Tann, L. R. 7 Eq. 436; Lewis v. Matthews, 20 L. T. (N. S.) 905; Row v. Row, 7 Eq. 414; Grimwood v. Cozzens, 5 Jurist (N. S.) 491; S. C., 2 S. & T. 364. See McKnight v. Wright, 12 Rich. (S. C.) Eq. 229. See remarks of the court in Canfield v. Ball, 4 Halsted (N. J. Ch.) 582, where the court upheld the action of the Orphans Court in refusing costs, declaring that the allowance of costs had become too general and should be stopped.

17 Jackman's Will, 26 Wis. 144, 364.

18 Dodge v. Williams, 46 Wis. 70.

19 Maurer's Will, 44 Wis. 70.

20 Goodacre v. Smith, 1 P. & D. 359.

21 Carroll's Will, 50 Wis. 437.

22 Nichols v. Burns, 1 Sw. & Tr. 239.

23 Stacey v. Spratley, 4 De G. & J. 199.

24 Rev. Stat. Ch. 117, sec. 136; Laws of Wisconsin, construed in Jackman's Will, 26 Wis. 364. See Conley v. McDonald, 40 Mich. 150.

25 Id.

his will, has created, which is as binding a charge as any debt he contracted.[26] But it may be said that it is absurd that the winning party should have his costs, and that the losing party may immediately turn about and demand from him the money with which to pay them. This may seem ludicious, but it has been held that statutes relating to costs in will contests, have not robbed the courts of their discretionary powers.[27]

But have these statutes deprived courts of their power to reimburse the losing party, to say nothing of refusing to the prevailing party his costs against the former? We think not. In Kentucky, under a statute substantially of this character, an unsuccessful executor was allowed his costs, and no attempt was made to apply the statute to him.[28] In construing statutes, the object for which their enactment was sought is always entitled to consideration. The want they were intended to supply is a safe guide to the effect which should be given to them. Applying these principles to the question under consideration, it is well known that costs were unknown to the common law. Successful suitors had no remedy for the injury they had sustained by being dragged into court or kept there by some groundless action or defense. The court had no power to grant relief. Thereupon Parliament stepped in, and statutes were enacted which supplied the long felt want, and punished the culprits. These statutes could not have been contemplated to aid courts exercising equitable powers, for the power to allow costs therein, had long been assumed and recognized. These late statutes are substantially reprints from the old statutes, and they must be construed from the same standpoint. We take it then that the only reasonable conclusions which can be drawn, are (1) that these statutes do not apply to will contests; (2) that courts may still in the exercise of their equitable powers, award costs out of the estate to the losing party; (3) that these costs include reasonable counsel fees.

Contests upon Questions of Law —As is said by Judge Redfield[29] "whenever the executor or other person appointed to carry into effect the provisions of a will comes into a court of equity to obtain the direction of the court, in regard to the construction of the instrument, or the mode of carrying its provisions into effect, the expense of such litigation as it respects all the parties and as between attorney and client is charged upon the estate."[30] In other words "it has been frequently decided that costs ought to be charged upon the general assets of a testator or upon a general fund created by his will, if the will be drawn in such a manner as to create difficulty, and render a resort to a court advisable."[31] A charge of this nature is as much a burden upon the *residuum* as any debt.[32] But the costs may be apportioned among the parties to the litigation.[33] And, if the litigation has been produced by the claim of one, carried on for his sole benefit, it would be wrong to charge the residuary legatee with the costs;[34] but not so if he were an infant, lunatic or idiot.[35]

It is a well settled rule, however, that where a legacy has been severed from the bulk of the estate and becomes the subject of litigation that particular fund, and not the general estate, is to bear the costs.[36] As Lord Eldon would have it, "after the residuary legatee has paid out of the bulk and done all that is incumbent upon him, if a question arises as to the interest in that property clearly severed from the bulk, the expense of questions

[26] Andrews v. Bishop, 5 Allen, 490; Wood v. Valentine, 6 Paige, 277.
[27] Chapin v. Miner, 112 Mass. 269.
[28] Gilbert v. Bartlett, 9 Bush, 49.
[29] Redfield on Wills, Vol. I.

[30] Studholme v. Hodgson, 1 P. Wms. 303; Pearson v. Pearson, 1 Sch. & Lef. 12; Banington v. Tristam, 6 Ves. 345; Jollie's Est. 3 Br. C. C. 25; Baugh v. Reed, Id. 192; Morton, J., in Sawyer v. Baldwin, 20 Pick. 378, 389; Attorney General v. Jesus College, Oxford, 7 Jur. N. S. 392; Magridge v. Thackwell, 1 Vesey, Jr. 475: s. c. 7 Id. 36; Currie v. Pye, 17 Ves. 462; Brown v. Brown, 41 N. Y. 514. See Van Steenwyck v. Washburn, 17 Cent. L. J., 489.
[31] Per Chancellor Kent in Rogers v. Ross, 4 Johns. Ch. 608; Drew v. Wakefield, 54 Me. 291; Smith v. Smith, 4 Paige, 271; Morrell v. Dickey, 1 Id. 453; Puxley v. Puxley, 8 L. T. N. S. 570 Per. V. C. Wood; Row v. Row, L. R. 7 Eq. 414; *In re* Tam. Id. 436; Maxwell v. Maxwell, 19 W. R. 15; L. R. 4 H. L. Cas. 521; Bliss v. American Bible Society, 2 Allen, 334; King v. Strong, 9 Paige, 94.
[32] Andrews v. Bishop, 5 Allen 490; Wood v. Valentine, 1 Paige. 277.
[33] Mitchell v. Blain, 5 Paige, 558.
[34] Smith v. Smith, 4 Paige, 271.
[35] King v. Strong, 9 Paige, 27.
[36] Dean v. Dean, 54 Wis. 23; Bliss v. American Bible Society, 2 Allen, 334; Attorney General v. Lawes, 8 Hare, 32; Martineau v. Rogers, 8 De G. M. & G. 328.

touching that fund ought to be thrown upon that fund."[37]

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[37] Jenour v. Jenour, 10 Vesey Jr. 572.

LEGACIES GIVEN IN A PARTICULAR CHARACTER.

In a recent number we reviewed several cases on the "Effect of Divorce and Nullity of Marriage on the Character of a Legatee as Husband or Wife." In the present paper we propose to take a general survey of the subject of which this formed part, considering other characters and other circumstances affecting the possession of the character than those formerly mentioned.

Sometimes no individual is designated as the legatee, nor indeed is any individual intended, but the legacy is given to the person, whoever he may be, who possesses a particular character. In these cases any question which arises is this—What, taking all things into consideration, is the precise character which it may be supposed was intended by, and was in the mind of the testator? Of this kind was the case of Bulmore v. Wynter,[1] mentioned in our former article. The testator left the income of the residue of his estate to the testator's daughter, and after her death "to any husband with whom she might intermarry, if he should survive her." The daughter married, was divorced, and the husband survived her. She had not married again. What was the character pointed out by this description? Was it "the surviving husband?" Must the person entitled be a husband who survived her as her husband? The court, taking the parts of the description, "any husband with whom she may intermarry," and "if he survives her," separately, held that it was not necessarily a husband who survived her as her husband. To this view the objection is, that if the lady, after being divorced, had married again, and the second husband survived her, he would have been entitled, or at least would have had as good a claim, to the possession of the character. If the second claimant were to be preferred, this shows that the character was one that never was possessed by the actual claimant, the husband who survived her but not as her husband. If the second claimant were equally entitled as the first to take under the character this shows that the view of the character which permits this, and under which the actual claimant was allowed to take, was not a sound one, for the character intended was not one applicable to more than one person.

A recent English case illustrates the principle that a person may take under a character although he does not, strictly speaking, answer to the description, provided he possesses the character which the testator may reasonably be supposed to have intended.[2] The Earl of Stamford and Warrington had devised certain estates to trustees during the life of his wife, in trust for her, subject to a payment out of his Cheshire estates of £8,000 a year "to the person who shall for the time being be Earl of Stamford and Warrington." Subject to this disposition, this Cheshire estate was to go to Mr. Harry Grey and his heirs in tail made. On the testator's death, Mr. Harry Grey became Earl of Stamford, but the title of Warrington became extinct, so that there was no person holding the character of Earl of Stamford and Warrington. The £8,000 was claimed by Mr. Harry Grey, and Mr. Justice Kay sustained the claim. The late Earl had been twice married, the second marriage had lasted for twelve years, and there were no children by either marriage, so that the very great probability must have been contemplated of his never having a son, in which case the Warrington title fell. But the court held that the testator must have intended the £8,000 a year for somebody, and the person intended must have been the person who succeeded to the title that remained, although the testator should die without issue. In all likelihood, it was said, the testator had forgotten that the dignities were held on different grants. It cannot fail to be noted, however, that the Cheshire estate was left by name to Mr. Harry Grey and his heirs, who would succeed, and who the testator knew would succeed, to the title of Stamford, if the

[1] L. R., 22 Ch. Div. 619.

[2] *In re* Earl of Stamford and Warrington's Estates, Earl of Stamford v. Payne, July 31, 1883.

testator left no son. How was it that, if by Stamford and Warrington the testator meant the person who would succeed to any of his titles, he, knowing that Mr. Harry Grey would so succeed, did not leave the annuity of £8,000 to him by name also? Does not the mention of Harry Grey in the one case, and Earl of Stamford and Warrington in the other, point to the idea of the possibility of these being different persons? Yet in the theory that prevailed, that by Stamford and Warrington was meant the person who succeeded to the Stamford title alone, these necessarily meant the same person.

The larger class of cases of legacies given in a particular character is where an individual is pointed out by name, and a character or description, as husband, wife, etc., is added. Sometimes the addition is merely designative or demonstrative. These cases fall under the general rule as to *falsa demonstratio*, the only question being whether the person is sufficiently identified. These are not properly cases of bequest in a character, but there is a frequent difficulty in determining whether the case falls within the one category or the other. The cases of bequest to a person in a character proper are where the addition is significant of a motive prompting the gift. The failure of the character does not necessarily involve the failure of the legacy. The question whether the bequest stands or falls depends upon many and varying circumstances, suggestive of varying considerations, according as the character has been falsely assumed or erroneously attributed or supposed to be possessed, or as it is to be regarded as the sole motive of the bounty, or, to express it more accurately, the motive in the absence of which the gift would not have been made, or as merely indicative of a larger motive which may subsist, although the special quality or character in which the bequest is given fails.

It is to the first of these two classes of cases, the cases where the addition is merely designative, that the old maxim applies: *Veritas nominis tollit errorem demonstrationis*, of which this example is given in Lord Bacon's Maxims of the Law: "So if I grant land *Episcopo nunc Londinensi, qui me erudivit in pueritia*, this is a good grant although he never instructed me." Such a maxim as this gives no help in determining whether the case falls within the category of character or of mere description. Nor is the rule by any means absolute, even in regard to description. As is said by Mr. Justice Maule in Gains v. Rouse:[3] "This rule, which used to be most strictly applied, has been relaxed in modern times when it can be shown from what appears on the face of the will itself that the plaintiff meant another and a different person from the person named in the will; the reason is in order that the real intention of the testator may be carried out." * *

Where the particular character in which the legacy is given has been falsely assumed by the person claiming it, the legacy is void. The leading case on this subject is Kennell v. Abbott.[4] The testatrix left a legacy to "my husband, E L." At the time of the marriage he was the husband of another woman, but had passed himself off as an unmarried man. The testatrix was unaware, and remained unaware, of his real position. Lord Alvanley said: "Upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man, availing himself of that character of husband of the testatrix, and to whom in that character the legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. * * * * This is a legacy to her supposed husband, and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted in making a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it, and therefore he can not demand his legacy." The same principle, which is in truth the principle that what is based upon fraud is voidable, was given ef-

[3] 17 L. J. (C. P.), 108.
[4] 4 Ves. Jun., 809.

fect to in the previous case of *Ex parte* Wallop.[5] A woman induced the man with whom she had cohabited to believe that she had several children to him, and had shown him children as his which were not his nor even hers. He left legacies to them as her children by him. These legacies were held void. "There were," says Lord Alvanley, commenting on this case,[6] "two things wanting. The testator was not merely deceived as to their being his children, but he was deceived as to the other ingredient of the character in which he gave them the legacies, for they were not the children of that woman." Lord Alvanley takes care to draw a distinction between such a case as that in Kennell v. Abbott and one where the character has been falsely attributed to the legatee through no fault of the legatee himself. "I desire to be understood not to determine that where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it and which might entitle him, though he might not fill that character in which the legacy is given. My decision, therefore, totally avoids such a point." His lordship proceeds to consider another case: "Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field."

In the comparatively recent case of Wilkinson v. Joughin,[7] the distinction between the case where the false belief as to the character of the legatee, was induced, and that it was not induced by the fault of the legatee was markedly illustrated. The imposition practised led to two false beliefs; the person guilty of it was alone made to suffer. A legacy was given by a testator to a woman in the character of, and described as, and believed by him to be, his wife, but who at the time the marriage ceremony was gone through, and at his death, had a husband living, which circumstance was known to her. Another legacy was given to her child, described as "my step-daughter." The former legacy was held void, not so the latter. Vice-Chancellor Sir John Stuart said: "The evidence shows that she, the alleged wife, imposed in a very gross manner on the testator. Therefore the legacy to her must be declared void. * * * * The right of the infant seems to me very clear. An attempt has been made to show that, inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was through that fraud induced to believe that her child was his step-daughter, the bequest to her wholly fails. But in the case referred to of Kennell v. Abbott, Lord Alvanley takes care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description."—*Journal of Jurisprudence.*

[5] 4 Bro. C. C.
[6] Kennell v. Abbott.
[7] L. R., 2 Eq. 319; (1866).

AGENCY—NATIONAL BANK—AUTHORITY OF CASHIER—NOTICE TO DIRECTORS.

MARTIN v. WEBB.

United States Supreme Court, January 7, 1884.

1. A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors.

2. His authority may be by parol and collected from circumstances or implied from the conduct or acquiescence of the directors.

3. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, that he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank.

4. When, during a series of years, or in numerous business transactions, he has been permitted, in his official capacity, and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the cor-

poration, that he has acted in conformity with instructions received from those who have the right to control its operation.

5. That which directors ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

HARLAN, J., delivered the opinion of the court:

This is an appeal from a decree in two suits in equity commenced in one of the courts of the State of Missouri, and thence removed into the Circuit Court of the United States for the Western District of that State, where, by consent, they were consolidated for final hearing.

The question presented is whether the appellant, the Daviess County Saving Association, a banking corporation of Missouri, doing business at Gallatin, in that State, is, under the circumstances of this case, estopped to deny that the cancellation, in its name and by the cashier, of certain notes secured by trust deeds upon real estate, and the release of record of the liens given by those deeds, was by its authority and binding upon it. The facts bearing upon this question, as they are disclosed by the pleadings, testimony, and stipulations of counsel, are substantially as will be now stated.

On the 30th day of June, 1879, one Patrick S. Kenney was largely indebted to that association. The indebtedness was secured by recorded deeds of trust upon several tracts of land, in some of which, embracing a large part of this indebtedness to the bank, his wife had not joined. These deeds bore date, respectively, February 8, 1872, November 17, 1873, December 20, 1873, August 28, 1874, September 21, 1874, May 24, 1875, and April 1, 1876. In three of them the trustee was Robert L. Tomlin, who, at the date of their execution and during the entire period covered by the transactions to be hereafter recited, was a director and the cashier of the bank. Kenney and wife had also executed and delivered a deed of trust upon a portion of the same lands, for the benefit of James D. Powers, to secure a debt of $5,000 and interest. As to the lands therein described, it gave a lien superior to that created by any of the before-mentioned deeds, except the one of date February 8, 1872.

On the 15th day of July, 1875, and 1st day of November of the same year respectively, the Exchange Bank of Breckinridge, Missouri, and one Thomas Ryan, obtained judgments for money against Kenney, which, on June 30th, 1879, remained, or were believed by those interested in them to remain, liens superior to that given by the foregoing deed of April 1, 1876.

It was desired by Tomlin, the cashier, to have Kenney's indebtedness to the bank in better shape than it was, and to secure further time on his indebtedness to other parties. He also deemed it important that the liens upon these lands, (whether created by trust deeds or judgments,) which were prior to those held by the bank, should be removed, and that Mrs. Kenney's signature be obtained to a trust deed or deeds in favor of the bank, covering all the lands of her husband. He, therefore, requested Kenney to obtain a loan of money sufficient to satisfy all liens prior to those held by the bank. Tomlin did not wish his bank to make further advancements to Kenney, believing the latter would be more prompt with strangers, than with the bank, in paying interest as it matured. In order to affect the desired result, application was made by the cashier to Frank & Darrow, of Corning, Iowa, for a loan to Kenney. After some negotiations, that firm made an arrangement with Albert S. Webb, R. L. Belknap, and William H. Kane, of New York, trustees under the will of Henry R. Remsen, for a loan of money to Kenney for five years, at eight per cent. interest, to be secured by a trust deed on his lands, which would give them a lien prior and superior to that held by all others, including the bank. It was expressly agreed between Frank & Darrow, representing the trustees of Remsen, on the one side, and Kenney and Tomlin, the latter representing his bank, on the other side, that the money thus obtained should be applied, as far as necessary, to the debts secured by the before-mentioned Powers deed of trust, and to the two judgments against Kenney; that the balance should be paid to the bank, which should then cancel and surrender the notes held against Kenney, taking a new note from him, and entry of record satisfaction and release of its liens under the several deeds; that Kenney and wife should execute a deed of trust, giving a first lien to Remsen's trustees to secure the loan by them made; a like deed, giving a lien subordinate to that of Remsen's trustees, to secure Frank & Darrow in the sum of $1,000, the amount stipulated to be paid them for effecting the loan; that Kenney and wife should also make a deed of trust on the same lands to the Daviess County Saving Association, giving a lien subordinate to those given to Remsen's trustees and to Frank & Darrow, for the balance of their claims against Kenney remaining after crediting such portion of the $10,000 received from Remsen's trustees as should be paid to the bank.

No part of the sum received from Remsen's trustees was paid directly to or disbursed by Kenney; but, conformably to the agreement between the parties, $5,200 of it was applied in satisfaction of the debt secured by the Powers deed of trust, $1,689.86 in discharge of the two personal judgments against Kenney, and the balance, $3,110.14, was paid to the bank. A new note was then executed to the bank by Kenney, and the $3,110.14 entered on its books as a partial payment thereof. Satisfaction was entered of record in the name of the bank by its cashier of all the debts held against Kenney, and the old deeds of

trust held were also cancelled of record in its name by the cashier. Deeds of trust executed by Kenney and wife, of date July 1, 1879, were then placed upon record, all on August 6, 1879, but distinctly giving liens upon the lands in the order already indicated.

The new deed to the bank, in addition, expressly provides that the lien thereby created is subordinate to that given Remsen's trustees.

The old notes of Kenney were marked by the cashier on the books of the bank as paid, and the note entered as the one Kenney was to pay. The $3,110.14 went into the general funds of the bank, and was used in its business. The old notes and deeds, being first stamped by the cashier as "paid," were placed by him in an envelope marked with Kenney's address. The cashier had promised when this arrangement was consummated to send them to Kenney, but finding the package containing them to be bulky they were held for delivery to him when he should call at the bank.

The Daviess County Savings Association was organized in 1865. Of its paid up capital stock, at the time of these transactions, all, except a very small amount, was owned by McFerran, Hemry, and Tuggle—McFerran owning a majority of the whole stock. McFerran was elected president, and from sometime in 1870 until Jan. 1st, 1872, Tomlin was acting cashier, and from the latter date until January 1st, 1881, he was cashier. At the outset the business seemed to have been managed entirely by the chasier under the general supervision or direction of McFerran. But desiring to extend the field of his business operations, the latter removed in 1873 to Colorado, and there engaged in banking business. He did not return to Missouri until February, 1881. During his absence, and up to 1879, he claimed to be the president of the association. But during the whole period of McFerran's absence, the exclusive management of the business of the bank seemed to have been left to the cashier, without interference from any quarter. This state of things continued even after the election of Hemry as president on 1st day of January, 1879. Tuggle, one of the directors, says he never gave much attention to the affairs of the bank. He resided some distance from Gallatin; came to town about once a month, staying sometimes a week; was in the bank frequently, but never gave much attention to its affairs; when there he would inquire of the officers how it was 'running' or 'getting along,' but he never examined its books, money, or notes; and when in town, did not, he says, do anything about 'running the affairs of the bank.' He testifies that the meetings of the board of directors were "simply for the purpose of electing officers and declaring dividends." He knew that the business of the bank was varied, presenting itself in different forms; that deeds of trust were taken from time to time; and that in the course of its business it was necessary to cancel such deeds. Upon cross-examination he said: "Tomlin was attending to the business of the bank from 1873 up to the time this loan was made. * * * * When a man applied to the bank for a loan, or to have a deed of trust changed, or the security changed, my understanding was that Tomlin attended to it. * * * * I never questioned Tomlin's right to cancel a deed of trust from 1873 to 1879; never knew of any other director questioning his right during that time. * * * Tomlin was acting as cashier from 1865 up to the time of making this loan, and, so far as I know, was transacting generally all the business necessary to be transacted here at the bank." When asked by whom he expected a deed of trust to be cancelled, when executed by one who applied to the bank for a loan, and gave other security, and wished that deed released, his answer was: "I expected Tomlin attended to it." When asked whom he supposed had such authority from 1873 to the time of the loan in question, his answer was: "I understood he (Tomlin) was doing it. I never thought much of it, and knew nothing about his authority." Again, the same witness: "My understanding is that Tomlin was doing the business of the bank. Can not say when it was I first heard of this loan. When I heard it I did not do anything." Hemry, the other director, and who was elected president of the bank for 1879, said that he did not, nor did any individual director, to his knowledge, give orders as to the release of securities. "To be very particular," said he, "I don't think of any particular case in which I directed or advised." It thus appears that from 1873 up to 1880, during McFerran's absence in Colorado, there could have been no supervision of the business by him, and that the local directors surrendered all control to the chashier, who was their co-director. If they did not abdicate all authority as directors, they acquiesced in the cashier's assumption of exclusive management of the bank's business.

Tomlin understood, and from the conduct of the directors had reason to understand, that he was invested with full authority to manage the operations of the bank according to his best judgment, and without disturbing the directors. This explains the fact—which is quite extraordinary in view of the present position of the bank—that from 1873 to 1880, inclusive, Tomlin, as cashier, entered in the name of the bank, upon the proper records of the county, satisfaction of more than one hundred and fifty different deeds of trust executed to secure debts held by the corporation. In no instance did he receive previous orders to do so from the directors. His authority or duty to do so was never questioned to his knowledge, or to the knowledge of any one having business with the bank. To all who came into the bank or had transactions with it his control seemed to be as absolute as if he were the owner of all the stock. His authority to make the arrangement with Kenney, Frank & Darrow, and Remsen's trustees was never questioned by any one until February, 1880, when McFerran returned from Colorado on

a visit to Missouri. Tomlin during his explanation of the details of that arrangement exhibited to him the old notes and trust deeds, they having remained in his possession in the package in which he originally placed them for Kenney. McFerran took possession of them, claiming that they were the property of the bank, although after the new deed of trust Kenney had given up the land to the bank and took back a lease from it.

The bank, having through Tomlin's management and with the money obtained from Remsen's trustees removed the lien given by the Powers deed of trust, and the lien or the claim of lien upon a part of the lands in virtue of the judgments obtained by the Exchange Bank of Breckinridge and Ryan, now ignores the new deed of trust, and seeks to foreclose the lien given by the original deeds, thereby defeating the prior lien given to Remsen's trustees by the deed of 1879; this, upon the ground that Tomlin, as cashier, without authority and without their knowledge, had assumed to discharge the original debts, to cancel the original trust deeds, and to take a new note secured by a new deed of trust. It is to be observed that while the bank repudiates this arrangement, upon the faith of which Remsen's trustees parted with their money, it retains and does not offer to return, but has used in its business, $3,110.14 of the sum loaned by those trustees through Frank & Darrow to Kenney. It is willing to accept all the benefits resulting from the acts of its cashier, but endeavors to escape the burdens attached to it by the agreement of the parties.

We have stated with some fulness the circumstances disclosed by the record, so that the general expressions in this opinion may be interpreted by the facts of this case. To permit the bank, under these circumstances, to dispute the binding force of the arrangement made by its cashier in reference to Kenney's indebtedness, including the cancellation of the old note and trust deeds, and the acceptance of the new ones, would be a mockery of justice. It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way. United States Bank v. Dunn, 6 Pet. 51; United States v. City Bank of Columbus, 21 How. 356; Merchants' Bank v. State Bank, 10 Wall. 604. Ordinarily, he has no power to discharge a debtor without payment, nor surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned — certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business, under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

These principles govern the case before us, and lead necessarily to an affirmance of the decree adjudging the surrender cancellation of the old deeds and the notes given by Kenney, and declaring the liens in favor of Remsen's trustees and Frank & Darrow to be superior to that of the bank.

CORPORATION — FORGED TRANSFER OF STOCK — WARRANTY — MEASURE OF DAMAGES.

BOSTON AND ALBANY R. R. CO. v. RICHARDSON.

Supreme Judicial Court of Massachusetts, September, 1883.

1. A corporation which issues a new certificate of stock to a party upon the faith of a forged transfer or power of attorney presented by him can recov-

er against such party, either in an action of contract for breach of implied warranty, or in an action of tort in the nature of case.

2. In such an action the damages are: 1. The costs and expenses (not including counsel fees) of the suit brought by A, the party whose name was forged, against the corporation to compel it to issue to him new stock to replace that wrongfully transferred, the corporation having notified the present defendants of that suit, and requested them to defend their warranty of the genuineness of A's signature, which was there in issue. 2. The cost of the stock which, as soon as the fact of the wrongful transfer was determined, the corporation bought to replace the stock wrongfully transferred from A. 3. The dividends which the corporation was obliged to pay to A, being such as were declared on the stock while A was wrongfully deprived of it.

Action to recover the value of certain shares of stock.

The case was tried in the court below before a single judge without a jury, who found for the plaintiff and reported the case for the consideration of this court upon questions of law. The facts sufficiently appear in the opinion.

J. C. Gray and *W. C. Loring*, for plaintiff. *Geo. Putnam*, for defendants.

MORTON, C. J., delivered the opinion of the court:

This case presents an important question referred to but not decided in Machinists' National Bank v. Field, 126 Mass. 345. In January, 1876, Mrs. Pratt owned five shares of the stock of the Boston and Albany Railroad Company and held a certificate running in her name. Her son forged her name to a blank power of attorney printed upon the back of the certificate and delivered it to one Field, a broker. Field sold the shares to the defendants and delivered to them the certificate with the forged signature thereon. The defendants presented it to the transfer clerk of the plaintiff by Brown, their clerk, who filled up the blanks so as to make it a power of attorney to Brown to transfer the shares to Richardson, Hill & Co., the defendants. Throughout Brown was acting as the agent and on behalf of the defendants. Thereupon the transfer clerk permitted Brown to transfer the shares upon the books of the corporation, and issued a new certificate to the defendants. Subsequently, and before the discovery of the forgery, the defendants sold the stock to a third person, and at their request the corporation issued a new certificate to the purchaser. Upon these facts it is clear that Mrs. Pratt never parted with her property in the shares, and therefore the plaintiff was obliged to procure five shares of its corporate stock and issued a certificate to her, and also to pay her the dividends upon the five shares. Pratt v. Taunton Copper Co., 123 Mass. 110, and cases cited. It is also settled that the corporation has no remedy against the person who purchased of the defendants, because as to him the corporation is estopped to deny its certificate issued to the defendants and transferred to the purchaser. Machinists' National Bank v. Field, 126 Mass. 345, and cases cited.

The question in this case is whether it has a remedy against the person who presents a forged transfer or power of attorney upon the faith of which it issues to such person a new certificate. This question has never been directly decided in this commonwealth, but the adjudged cases furnish analogies which aid us in its solution. It is familiar law that in a sale of chattels a warranty of title is implied unless the circumstances are such as to give rise to a contrary presumption. Shattuck v. Green, 104 Mass. 42. The possession and offer to sell a chattel are held equivalent to an affirmation that the seller has title to it. This is founded upon the reason that men naturally understand that a seller who offers a chattel for sale owns it. The same rule has been extended to the case of a sale of a promissory note. The seller impliedly warrants that the previous signatures are genuine. Cabot Bank v. Morton, 4 Gray, 156; Merriam v. Wolcott, 3 Allen, 258. So it has been held that if one, honestly believing himself to be authorized, acts as agent for another and procures money or goods upon the credit of his supposed principal, and it turns out that he is not authorized, he is liable for the money or the value of the goods. Chief Justice Shaw says, "If one falsely represents that he has an authority, by which another relying on the representation is misled, he is liable; and by acting as agent of another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable." Jefts v. York, 10 Cush. 392. The chief justice adds, "But in both cases his liability is founded on the ground of deceit and the remedy is by action of tort." We do not understand him as intending to say that the only remedy is the technical action of deceit, and that a guilty knowledge must be proved. He used the word "deceit" in the sense of tort. In numerous other cases the remedy is said to be an action on the case for falsely assuming to be an agent. Bartlett v. Tucker, 104 Mass. 336, and cases cited. And in the case of May v. Western Union Telegraph Co., 112 Mass. 90, it was held that the proper remedy is not an action of deceit, but "it is an action in the nature of a false warranty against one acting as agent who represents that he has authority when he has not. Whether such representation is made in terms, or tacitly and impliedly, he supposing but not knowing the fact to be true, he is liable to the person misled." We can see no good reason why an action of contract upon the implied warranty can not be maintained in the same manner as it may be upon the implied warranty in the sale of chattels. Randall v. Trimeu 18 C. B. 786; Richardson v. Williamson, L. R. 6 Q. B. 276; Baltzen v. Nicolay, 53 N. Y. 467. But it is not necessary to discuss this, because in the case at bar there is both a count in contract

and a count in tort in the nature of case for falsely assuming to act as agent.

Perhaps these considerations are sufficient to dispose of this case; but it seems to us that the result would be the same if Mrs. Pratt had signed the transfer on the back of the certificate instead of the power of attorney. The difference between the two modes of effecting a transfer is theoretical rather than practical. There is in either case a similar implied representation or warranty. If one buys stock and takes a transfer, and presents the certificate to the corporation and demands a new one, he thereby impliedly represents that he is entitled to the new certificate. He demands it as his right; this implies that he is the owner and has a right to it. The corporation has the right to understand him as asserting this. It is not bound to question or investigate the genuineness of the transfer and see if the purchaser has not been defrauded. When the purchaser presents his transfer and certificate, the transfer office naturally understands that he claims that the transfer is valid, and that he has a right to a certificate; he has the right to act as if this had been said in terms. And if relying upon such tacit and implied representations the corporation suffers a loss, the purchaser who misled it is liable. The case of Simm v. Anglo-American Tel. Co., L. R. 5 Q. B. D. 188, is very much like the case at bar. The court of appeal held, overruling Lindley, J., that the loss must fall upon the purchaser who took the forged transfer, and not upon the company. Bramwell, L. J., says, "Burge & Co. sent to the company a document purporting to be a transfer from Coates, and in effect demanded to be registered as transferees of the stock; to this demand the company assented. How can these facts constitute an estoppel against the company? What have they done that they should be barred from saying that Coates did not transfer the stock?" In Hambleton v. Central Ohio R. R. Co., 44 Md. 551, the plaintiff in good faith advanced money upon stock of the defendant company pledged to them under forged powers of transfer. The railroad company, upon the receipt of the original certificates of stock, in good faith cancelled them and issued new certificates in the name of the plaintiff. Afterwards the plaintiff sold the stock to a third party, but the railroad company, having discovered the forgery, refused to permit a transfer to such third party. It was held that the loss must fall upon the plaintiff, the court saying that it was the plaintiff's duty to ascertain the genuineness of the signature, and that the company were not estopped by having issued a certificate to him. To the same effect is Brown v. Howard Fire Ins. Co., 42 Md. 384. These cases differ from the case before us in the fact that at the time the forgery was discovered the first transferee still held the shares. But how can this make any difference? The transfer to a third party by the defendants did not change their relations to the plaintiff; it did not purge their misrepresentations, or give any added weight to the act of the plaintiff in issuing to them a certificate; instead of holding the stock they hold its proceeds. The defendants have been cheated, but they have not lost their money by any act of the plaintiff; they lost it because they failed to make the inquiries necessary to detect the forgery. They have a remedy over against the person who sold the stock to them; but the plaintiff has no remedy except against the defendants. We are of opinion that in law and upon the equities of the case the plaintiff is entitled to recover, and that it can maintain this action.

The remaining question is the measure of damages. The defendants contend that the measure is the value of the stock at the time the forgery was discovered. The plaintiff contends that it is the amount which it was obliged to expend in order to replace Mrs. Pratt's stock and the costs and expenses of the suit brought by Mrs. Pratt, but not including counsel fees. In regard to the costs and expenses of the suit, we think the case falls within the principle of Coolidge v. Brigham, 5 Met. 68. That was an action of *assumpsit* upon the implied warranty that the signature of an indorser of a note transferred to the plaintiff by the defendant was genuine. The plaintiff in good faith sued the indorser, who successfully defended on the ground that his pretended signature was a forgery. It was held that the plaintiff, having notified the defendant to come in and maintain the genuineness of the indorsement, could recover his costs and expenses of the suit as a part of his damages caused by a breach of the warranty. In the case before us the plaintiff notified the defendants of the suit of Mrs. Pratt and requested them to defend it. It was their duty to defend their warranty of the genuineness of her signature. They refused to do so, and the costs and expenses incurred by the plaintiff in good faith in the attempt to defend the genuineness of the signature were a part of the actual loss sustained by it by reason of the defendants' breach of warranty. The other question as to damages grows out of the fact that the stock rose in value between the time the forgery was discovered and the termination of the suit of Mrs. Pratt. If the stock had fallen in value the defendants might well claim that they could not be held liable for anything more than the value at the time the plaintiff was required to procure it for Mrs. Pratt. It was not the duty of the plaintiff upon receiving notice that Mrs. Pratt claimed the signature to be a forgery to buy the stock and hold it at its own risk, any more than it was the duty of the defendants. They might have protected themselves at any time by buying five shares and thus putting themselves into a position to meet their warranty. We can see no good reason why they should throw upon the plaintiff the risk of fluctuations in the stock. As soon as it was determined that the signature of Mrs. Pratt was not genuine the plaintiff in good faith procured the stock to replace the five shares belonging to her. The amount paid by it was in fact the actual loss which it sustained, and we see no reason why

it should not recover this amount of the defendants.

No question is raised as to the plaintiff's right to recover the dividends upon the stock which it was obliged to pay to Mrs. Pratt; and upon the whole case we are of opinion that the finding of the superior court was correct, and that judgment should be entered thereon.

Judgment for plaintiff accordingly.

PARENT AND CHILD—EMANCIPATION OF CHILD—WAGES OF MINOR—ASSIGNMENT.

BEAVER v. BARE.

Supreme Court of Pennsylvania, October 2, 1883.

1. The right of a parent to the custody and personal services of a child is simply incidental to the duty of discipline and direction. A child is not the mere servant of the father, nor is the father bound to work the child for the benefit of his creditors; but may let him go when he will, whether he be solvent or not. Emancipation may be as perfect when they live together as if they were separated.

2. The right of a parent to the services of minor children is not, as such, absolute; but his right to their wages is vested, if the labor has been performed without any previous agreement or understanding to the contrary.

3. The release by a parent of his right to the wages of a minor child, executed to such child after a general assignment by the father and his partners in an insolvent firm for the benefit of its creditors, is of no validity as against such creditors.

Error to the Common Pleas of Franklin County.

On the trial, before ROWE, P. J., the following facts appeared: Jacob Beaver, John Bare, and D. F. Beaver associated themselves as the firm of Beaver, Bare & Co. early in the year 1877, in the business of manufacturing agricultural implements. Samuel J. Bare, the plaintiff, is the son of John Bare, a partner in the said firm. As shown by his account for labor filed, and by the books of defendants, he worked in the shops of said defendants from March, 1878, until November 17, 1879, when the said firm made an assignment for the benefit of their creditors to S. B. Rinehart. During all this time the plaintiff was a minor, and lived at the house of his father. He came of age March 24, 1881. The books of the firm contained a separate account with plaintiff, showing credits received by him personally. No claim was ever laid by the father to the wages of plaintiff, nor was he credited with the same on the books of the firm.

On October 30, 1882, John Bare executed a deed of release in favor of Samuel J. Bare, in which he did "remise, release, and quit-claim" all his interest in the wages due to said Samuel J. Bare from the firm of Beaver, Bare & Co.

The court instructed the jury: "I am of opinion that the plaintiff is entitled to recover, on the ground that the father, John Bare, had the right to execute a paper, releasing and relinquishing his right to recover the wages in favor of his son, and thereby the son was put in a position whereby he might sue the firm defendant in his own name."

The court therefore directed the jury to find for the plaintiff for the amount of his claim. Verdict accordingly for plaintiff in $437.93, and judgment thereon. Whereupon the defendants took this writ, assigning for error the refusal of their points.

John Stewart (*F. M. Kimmell* with him), for plaintiffs in error; *Joseph Douglas* and *McD. Sharpe*, for defendant in error.

CLARK, J., delivered the opinion of the court:

The exercise of parental authority is not necessarily for the profit of the parent, but for the advantage of the child; the duty of service by the child being deemed necessary to the proper exercise of parental authority for its own good. Although we still recognize the right of the father to the personal services of his children, that right is simply incidental to the duty of the father to discipline and direct them; his right to personal custody and personal service are secured to him, therefore, in order that through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift, and the means of personal success in life. Children are therefore not the mere servants of the father, nor is he bound to work them, as such, for the benefit of his creditors; McCloskey v. Cyphert, 3 Casey, 220; he may let them go free from his service, whenever he chooses, no matter whether he be solvent or insolvent. Holdship v. Patterson, 7 Watts, 547; Brown's Appeal, 5 Norris, 524. The right to their service, being merely for their good, whenever the father finds their interest, or his own, better subserved by their emancipation, he can liberate them. This emancipation may be as perfect when they live together, under the same roof, as if they were separated; for although the father thus relinquishes his right to their services, as a means of discipline, the duty of discipline still remains, and this duty can be better exercised in the family than elsewhere. McCloskey v. Cyphert, *supra*; Rush v. Voight, 5 Smith, 437.

In Brown's Appeal, 5 Norris, 524, this principle was fully recognized, and it was there held that the services of a son, rendered during minority, under a contract previously made with his father, was as valid consideration for a judgment confessed as similar services rendered under a contract made afterwards, and that both, or either, were sufficient to sustain the judgment, even as against creditors. Thus then it appears that a father may not only relinquish his right to the wages of his minor son's labor, but he may, even as against his creditors, bind himself to pay his son for such services, pursuant to a contract previously made. If, however, the contract had not been made previous to the service, neither could the son recover for his labor, nor would a voluntary judgment, given by an insolvent man, on such a consideration, be of any validity as against

creditors. Hack v. Stewart, 8 Barr. 213. Therefore we infer, that whilst the right of a father to the actual custody and services of his minor children is not, as such, an absolute or vested right, yet his right to wages for their labor is absolute and vested, if that labor has been performed without any previous act, agreement, or understanding otherwise. Of course he may, without intent to hinder, delay or defraud creditors, assign or relinquish this debt as any other. In the case of Kauffelt v. Moderwell, 9 Harris, 222, we held that when a minor is permitted by his father to make his own contract for services, it is fair to presume that he is allowed also to receive the wages for himself, and so the law implies the contract, until a contrary purpose appears; but it is not so when the father makes the contract. "He has the right to command the services and receive the wages of his minor son, and when he makes a contract for them, there is no ground for the presumption that he is acting as an agent of his son, or that the other party knows it, and intends the contract to be with his son; and, therefore, the law can not imply that such was the contract, as matter of fact, or impose it as a matter of duty. The private arrangement between the father and son, in this case, was a matter of their own, which constitutes no part of the transaction, and which is indeed revocable at the father's pleasure. To allow the recovery by the son in such a case might defeat just claims of Kauffelt against the father."

Was there any relinquishment by John Bare of the services of his son previous to his entering the employment of this firm, or at any time during its continuance, or afterwards, prior to the assignment? If not, then the father's right to these wages was vested and absolute at the assignment, and that right, passing under it, vested in his assignee for creditors. The paper, dated October 30, 1882, is of no avail for the purpose intended; it came too late; that which he released or relinquished to his son, he had previously transferred to his creditors. This case should have been submitted to the jury on the question of emancipation, which was practically withdrawn from the jury in the trial below. "No evidence of that sort," says the court, "was offered, so far as his wages was concerned, that he was allowed to receive his wages himself. I saw no evidence at all of that in the case; the wages, therefore, at the time they were earned, were by law due to the father." This was a practical withdrawal from the jury of that branch of the case. There was, we think, some evidence for the jury on this question. The account for these services was in the name of the son, not in the name of the father. No credit was given to the father for them, and the books were open to all the members of the firm. The plaintiff's charge for labor embraces two years and nine months, in which time there was no proof that the father claimed the benefit of them, whilst the son received all that ever was paid; he continued to labor after the assignment was made during minority, and received to himself wages from the assignee.

These circumstances, taken with the testimony of the sons, were certainly proper matters for the consideration of the jury. What effect they might have had upon the minds of the jury is not for us to say, but we think the court was in error in saying that there was no evidence on the subject.

The judgment is reversed, and a *venire facias de novo*, awarded.

MERCUR, C. J., and PAXSON, J., absent.

NOTE.—In Wilson v. McMillan, 62 Ga. 16, the father, who was insolvent, agreed to pay his minor daughter compensation for labor done for him. In holding that the father could permit the child to take his earnings to the exclusion of his creditors, the court said: "A father is not bound to claim the earnings of his child and appropriate them to his creditors. 3 Cas. 220. Of course, he can not take the earnings in fact and cover them up against the claim of his creditors by a mere colorable agreement with the child. But it is not apparent why a *bona fide* hiring of the child by him before the labor is performed, is not as valid a mode of waiving parents right as any other." And in Atwood v. Holcomb, 39 Conn. 270, the child had been emancipated by the father while insolvent, and the court held that it did not lie in the mouth of the creditors to attack the emancipation.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—PRIVITY—GUARDIAN AND WARD—ASSIGNMENT BY WARD TO THIRD PERSON.
When a guardian places the money of his ward, who has become of age, in the hands of his attorney, to pay to the ward, and the latter assigns

a part of the fund to a third person, such assignment is binding, and the assignee can maintain an action for money had and received against the attorney, notwithstanding the want of privity. *McFadden v. Wilson*, S. C. Ind., Dec. 18, 1883.

2. ACTION—TO RESCIND CONTRACT OF PURCHASE—MISTAKE—WARRANTY.
One who purchases under a warranty deed, containing covenants of seizin and quiet possession, can not rescind the bargain on the ground of a mistake as to the vendor's title if the mistake does not go to the entire consideration; as, where he supposed the vendor had title in fee-simple, instead of a mere life estate. *Leal v. Terbush*, S. C. Mich., Dec. 20, 1883, 17 N. W. Rep., 713.

3. ADMINISTRATION—RIGHT OF EXECUTOR TO RETAIN ATTORNEY'S FEES.
An executor is entitled to credit for sums paid an attorney for legal advice when the charges are reasonable and proper in amount. *Eppinger v. Canepa*, S. C. Fla., Nov. 20, 1883.

4. AGENCY—ILLEGALITY—MANDATE—MONEY COLLECTED.
While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property belonging to his principal, he is bound to turn it over to him, and can not shield himself from liability therefor upon the ground of the illegality of the original transaction. *Norton v. Blum*, S. C. Ohio, 22 Am. L. Reg., 783.

5. AGENCY—INCIDENTAL POWERS.
Mere authority to execute a promissory note does not include authority to pay the same when it becomes due, or to receive demand of payment. *Luning v. Wise*, S. C. Cal. Dec. 29, 1883, 1 West C. Rep., 138.

6. ASSIGNMENT—CONTINGENT FEE—TORT—RIGHTS OF ATTORNEY.
An agreement to give a counsel a contingent fee out of the verdict to be recovered in an action of tort, can not operate as an assignment, a tort not being assignable. *Miller v. Haven*, S. C. S. Car., Oct. 25, 1883.

7. ATTACHMENT—PROPERTY HELD BY REPLEVIN.
Property replevied and delivered to the plaintiff in replevin upon his giving the bond required by law, is still in the custody of the law, and can not be attached as the property of the claimant, pending the determination of the replevin suit. *Owen v. Owen*, S. C. Mo., December, 1883.

8. COMMON CARRIER—DISCRIMINATION — EXTENT OF RIGHT TO EQUAL FACILITIES.
A common carrier must furnish equal facilities to his customers; and if he suffers one customer to violate a condition of his contract, he is estopped to object to similar violations by others. *Wells v. Oregon, etc. Co.*, U. S. C. C., D. Oreg., Dec. 24, 1883; 1 West C. Rep., 246.

9. COMMON CARRIER—FERRYMAN—CONTRIBUTORY NEGLIGENCE.
A ferryman is not liable to a passenger on his boat for the loss of property of which the latter retains control, if he by negligence contributes to the loss. *Dudley v. Camden, etc. Co.*, N. J. Ct. App., 16 Vroom. 368.

10. COMMON CARRIER—LIMITATION OF DAMAGES.
A common carrier can not relieve himself from liability for the full value of the goods, when they are lost by his negligence. *Overland Mail Co. v. Carroll*, S. C. Col., Dec. 4, 1883, 1 West C. Rep., 281.

11. CONSTITUTIONAL LAW—GRANT OF SPECIAL PRIVILEGES VOID.
The provision in the charter of a banking corporation allowing it to charge a greater rate of interest than is allowed by the general laws is unconstitutional. *Commercial Bank v. Trimble*, Ky. Ct. App., Dec. 19, 1883.

12. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS—LEGISLATIVE GRANT—EXEMPTION FROM TAXATION.
Where an exemption from taxation is provided for by the general laws of a State, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption. *Shiner v. Jacobs*, S. C. Iowa, Dec. 11, 1883, 17 N. W. Rep., 613.

13. CONSTITUTIONAL LAW—POWERS OF CONGRESS AND STATE LEGISLATURE — CREATION OF NUISANCE.
Neither Congress nor a State legislature may authorize the obstruction of a navigable stream to the injury of private individuals, for purposes wholly unconnected with commerce or post roads, or the exercise of the right of eminent domain. *Woodruff v. North, etc. Mining Co.*, U. S. C. C., D. Col., Jan. 7, 1884, 1 West. C. Rep., 183.

14. CONSTITUTIONAL LAW — QUARANTINE TAXES, DUTIES OR IMPOSTS.
Fees and charges imposed on vessels by quarantine laws of the State are exacted in compensation for services rendered, and are not taxes, duties or imposts within the prohibition of the Federal Constitution. *Morgans, etc. Co. v. Board*, S. C. La., Jan. 21, 1884.

15. CONTRACT — SUNDAY CONTRACT — RATIFICATION.
A contract made on Sunday, though void, may be ratified on a week day. *Kuhns v. Gates*, S. C. Ind. Dec. 11, 1883.

16. COVENANT—CONSTRUCTION—"ALL TAXES ASSESSED."
An agreement in a lease to "pay all taxes assessed" includes special assessments for local improvements. *Cassady v. Hanmer*, S. C. Iowa, Dec. 10, 1883; 17 N. W. Rep. 588.

17. CRIMINAL EVIDENCE—SIMILAR OFFENSES.
In a prosecution for illegally selling liquors, in which the defendant is claimed to have authorized a sale by his agent, it is competent to ask him on cross-examination whether or not he had not furnished the money to pay a fine for his agent in a previous prosecution. *Commonwealth v. Nash*, S. J. C. Mass; 7 Mass. L. Rep., Jan. 17, 1884.

18. CRIMINAL LAW—AUTREFOIS ACQUIT—ACQUITTAL AS PRINCIPAL—INDICTED AS ACCESSORY.
One who has been acquitted as principal upon an indictment for murder may be indicted as accessory to the same crime and convicted. *State v. Buzzel*, S. C. N. H., Reporter's Advance Sheets.

19. CRIMINAL LAW—CONSPIRACY—VERDICT AGAINST ONE.
It is impossible to convict one defendant on a charge of conspiracy against two, and to acquit the other, the charge being one and entire and not separable or divisible, and if the jury are not satisfied as to

the guilt of both, then both must be acquitted. *Reg. v. Manning*, Eng. H. Ct. Q. B. Div., Dec. 19, 1883.

20. CRIMINAL LAW—LARCENY—PROPERTY STOLEN IN ANOTHER STATE.
A person who steals property in one State and carries it into another, may be indicted in the latter. *State v. Hill*, S. C. So. Car. 17 Rep. 25.

21. CRIMINAL LAW—SOLICITATION TO COMMIT CRIME.
It is an indictable offense at common law for one to counsel and solicit another to commit arson, although the solicitation is of no effect and the crime counselled is not in fact committed. *Commonwealth v. Flagg*, S. J. C. Mass. 7 Mass. L. Rep. Jan. 17, 1884.

22. DECEIT—SIMPLEX COMMENDATIO.
A statement made in the sale of property that it was occupied by a most desirable tenant, although false, is *simplex commendatio*, and therefore not actionable. *Smith v. Land, etc.*, Eng. H. Ct. Ch. Div. 49 L. T. 533.

23. DIVORCE—EXTREME CRUELTY—FALSE ACCUSATION.
False accusations of marital infidelity on the part of the husband, made by the wife, may constitute such extreme cruelty as to entitle him to a divorc *Kelley v. Kelley*, S. C. Nev. 1 West C. Rep. 143.

24. ELECTION—WIDOW—IGNORANCE OF LAW.
An election by a widow to take under her husband's will, made without instruction as to her rights and upon the representation of her son-in-law that she would get nothing, if she did not accept the provision, will not bind her. *Sill v. Sill*, S. C. Kan. Jan. 16, 1884.

25. EMINENT DOMAIN—DELEGATION OF POWER OF ASSESSMENT TO STATE COURTS.
The United States, in the exercise of the power of eminent domain, may lawfully delegate to a State court the ascertainment of damages. *United States v. Jones*, U. S. S. C. Dec. 10, 1883; 30 S. C. R. 340.

26. EQUITY—FORECLOSURE OF MORTGAGE—PARTIES—HEIRS.
Heirs of a mortgagor need not be made parties in action for foreclosure. *Bayley v. Muche*, S. C. Cal. Jan. 11, 1884. 1 West. C. Rep. 125.

27. EQUITY—INJUNCTION—INTIMIDATION OF SERVANTS.
A master is entitled to an injunction restraining those who by threats and intimidation are preventing his servants from fulfilling their contracts with him, and inducing them to leave the place. *Hynes v. Fisher*, Can. H. Ct. Q. B. Div. Dec. 4, 1883.

28. EVIDENCE—CIRCUMSTANCES OF THE PARTIES.
The wealth and resources of a party may be considered by the jury to enable them to judge whether or not he has been able to produce all the evidence in his favor. *Daub v. N. P. R. Co.*, U. S. C. C. D. Oreg. 18 Fed. Rep. 625.

29. EVIDENCE—CONTRADICTION OF WITNESS.
If a witness does not remember, or denies, that he said what is imputed to him, evidence may be given that he did say it, provided it is relevant to the matter in issue. *Martin v. Fowle*, S. C. N. H. Reporter's Advance Sheets.

30. EVIDENCE — DECEIT — SIMILAR REPRESENTATIONS TO OTHERS.
Representations made to parties with whom a defendant was seeking to make contracts of agency, are admissible in corroboration of the testimony of a plaintiff who entered into such a contract with him, and who testifies that similar representations were made to him to induce him to make such contract, and the representations are denied by the defendant. *Porter v. Stone*, S. C. Iowa, 17 N. W. Rep., 654.

31. EVIDENCE — NEGLIGENCE — SUBSEQUENT CONDUCT AS ADMISSION.
In an action against a common carrier of passengers, for damages occasioned by the alleged negligence of his driver, the fact that after the accident he did not employ the same driver may be proved, as it tends to show an admission of negligence. *Martin v. Fowle*, S. C. N. H., Reporter's Advance Sheets.

32. EVIDENCE—PARTICULAR ACTS TO REBUT EVIDENCE OF REPUTATION.
Particular instances of careful and safe driving by the plaintiff's driver are competent to rebut the evidence of his character for unsafe driving, shown by particular instances of that kind. *Plummer v. Ossipee*, S. C. N. H., Reporters' Advance Sheets.

33. EVIDENCE—PRESUMPTION OF LEGITIMACY.
Upon the principle that innocence and right conduct are presumed, in the absence of proof of guilt and wrong conduct, and on account of the reluctance of the law to bastardize, the presumption in favor of legitimate birth is exceedingly strong. *Fox v. Burke*, S. C. Minn., Dec. 20, 1883; 17 N.W. Rep., 861.

34. EVIDENCE—TRANSACTIONS WITH DECEASED.
Where plaintiffs allege the existence of a partnership with the defendants' testate, they are incompetent witnesses to prove transactions or communications with the deceased, by which they expect to show a partnership resulted. *Eppinger v. Russell*, S. C. Fla., Nov. 20, 1883.

35. EXEMPTION—HOMESTEAD—EMINENT DOMAIN—DAMAGES.
Money payable by a railroad company for damages to a homestead, by reason of a condemnation of right of way over it, is exempt from execution or attachment. *Kaiser v. Leaton*, S. C. Iowa, Dec. 12, 1883, 17 N. W. Rep., 664.

36. EXEMPTIONS — HORSE — CONVEYING CHILDREN TO SCHOOL.
The use of a debtor's horse to convey his children to school and church is evidence on the question whether the horse is required for actual use, and exempt from attachment. *George v. Fellows*, S. C. N. H., Reporters' Advance Sheets.

37. EXEMPTIONS—"TOOLS"—PHYSICIANS CARRIAGE.
A physician's wagon and harness, used by him in riding to visit his patients, and reasonably necessary for the practice of his profession, are "tools of his occupation," exempting property from attachment. *Richards v. Hubbard*, S. C. N. H. Reporter's Advance Sheets.

38. FEDERAL COURTS—JURISDICTION—EXTRADITION—HABEAS CORPUS.
A person arrested under a warrant of extradition from one State of the Union to another "is in cus-

tody under or by color of the authority of the United States," and the national courts have jurisdiction to inquire by *habeas corpus* into and determine the legality of the same. *In re Doo Woon.* U. S. D. C. D. Oreg. Dec. 15, 1883.

39. HUSBAND AND WIFE—SUPPORT OF WIFE—ADULTERY OF LATTER.
A husband's duty of supporting his wife is not terminated by her adultery, committed with his consent given upon condition that she shall not look to him for support. *Fenen v. Moore*, S. C. N. H. Reporter's Advance Sheets.

40. INSANITY—DISAFFIRMANCE OF CONTRACT.
An insane person can not disaffirm his contract until he returns the consideration given. *Caldwell v. Ruddy*, S. C. Idaho, 1 Pac. Rep. 339.

41. INTEREST—LEGACY TO WIDOW.
Interest upon a legacy to the testator's widow does not begin to run until after one year from the testator's death. *Percy v. Percy*, Eng. H. Ct. Ch. Div. 49 L. T. N. S. 554.

42. MALICIOUS PROSECUTION — ARRESTING SERVANT.
One who procures the arrest of a railroad engineer while on duty, in a groundless civil suit, is liable to the railroad company for the damages resulting from the stoppage of the train although (1) the process was regular, (2) the suit had not terminated, (3) and the defendant was liable to the engineer. *Railroad Co. v. Hurt*, S. C. Vt. Reporter's Advance Sheets.

43. MASTER AND SERVANT—DEGREE OF CARE TO BE EXERCISED BY FORMER.
It is error to instruct a jury that a railroad company is bound to the same care of an employee that "a prudent and careful man would take of his family if placed in a like situation." *Louisville, etc. R. Co. v. McCoy*, Ky. Ct. App. 5 Ky. L. J. 397.

44. MASTER AND SERVANT—FELLOW-SERVANT.
One who mines coal and one who labors upon the roadway in miner's rooms are co-employes and fellow-workmen, and when an injury to the miner is caused by the negligence of the workman, the common employer is not responsible. *Troughear v. Lower, etc. Co.*, S. C. Iowa, Dec. 14, 1883. 17 N. W. Rep. 775.

45. MASTER AND SERVANT — FELLOW-SERVANT—MATE OF VESSEL.
The mate of a vessel is not a fellow-servant of a deck hand. *Daub v. N. P. R. Co.*, U. S. C. C. D. Oreg. 18 Fed. Rep. 625.

46. MORTGAGE — ASSIGNMENT — BONA FIDE PURCHASER.
A *bona fide* purchaser of a recorded mortgage is not affected by his assignor's knowledge of the existence of a prior unrecorded mortgage. *Jackson v. Reid*, S. C. Kan., Jan. 3, 1884, 1 Pac. C. Rep., 308.

47. MORTGAGE—CONVEYANCE SUBJECT TO MORTGAGE.
Where land is conveyed in terms subject to a mortgage, the grantee assumes no personal liability for its payment by the mere acceptance of the deed. *Lawrence v. Fowle*, S. C. N. H., Reporter's Advance Sheets.

48. MORTGAGE—OMISSION OF AMOUNT OF DEBT.
The amount of the debt secured by a mortgage need not be shown upon the face of the mortgage, if reference be made to other evidence thereof, from which the true amount of the debt may be determined. *Fetes v. O'Laughlin*, S. C. Iowa, Dec. 14, 1883, 17 N. W. Rep., 764.

49. MORTGAGE—PURCHASE BY SECOND MORTGAGE OF TAX TITLE.
The holder of a mortgage can not defeat a prior mortgage by acquiring a tax title. *Woodbury v. Swan*, S. C. N. H., Reporter's Advance Sheets.

50. MORTGAGE—WHEN COMPLETED—PRIORITY OF LIENS.
K, desiring to purchase land, applied to plaintiff's agent for a loan of $6,500, and the agent on May 31, to enable K to buy the land, loaned him $5,000, taking a mortgage to the plaintiff for $6,500, the date being left blank, to be filled in when the remainder was paid. On June 14, the appellant notified its agent of its acceptance of K's application, when the date was inserted and the balance paid. On June 7, A had innocently loaned K money on a mortgage of the same land. *Held*, that plaintiff's mortgage was not fully executed until June 14, and was therefore subordinate to A's mortgage. *Union L. Ins. Co. v. Abbott*, S. C. Ind., Dec. 11, 1883.

51. MUNICIPAL CORPORATION—ULTRA VIRES SALE OF COUNTY LANDS—LIABILITY FOR COMMISSION
Even though a county has no power to employ a broker to sell its lands yet if it adopts and completes a sale negotiated by him, it is liable to him for his commissions, especially, if it receives the avails of such a sale. *Call v. Hamilton Co*, S. C. Iowa, Dec. 12. 1883. 17 N. W. Rep. 677.

52. MUNICIPAL CORPORATION—LIABILITY FOR ACTS OF TAX COLLECTOR.
One whose property has been seized and sold to pay an illegal and void assessment for opening a street may maintain an action against the city to recover damages therefor. *Durkee v. Kinosha* S. C. Wis. Dec. 11. 1883. 17 N. W. Rep. 677.

53. NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY.
A woman who jumps off a train moving slowly at a station where the conductor should have stopped but neglected to stop, is not guilty of negligence *per se*. The jury having found against the company, the verdict was not disturbed—*Edgar v. Northern R. Co.* Can. H. Ct. Q. B. Div. Dec. 7. 1883.

54. NEGOTIABLE PAPER — PRESENTMENT — WHEN EXCUSED.
Presentment of a promissory note to a joint maker is excused, if at its making and maturity he resided in a foreign State. *Luning v. Wise*, S. C. Cal., Jan. 18, 1884, 1 West C. Rep., 138.

55. NEGOTIABLE PAPER—TRANSFER AFTER MATURITY—EQUITIES—NOTICE TO MAKER OF ASSIGNMENT.
It is not necessary to prove actual notice to the maker of a note of its assignment to cut off any defense by way of set-off which he may obtain; if he in any way acquires information of the sale of the paper to the plaintiff, he can not set up any claim which arises subsequently. *Johnson v. Johnson*, S. C. Ind., Dec. 13, 1883.

56. NUISANCE—PUBLIC — ABATEMENT BY PRIVATE INDIVIDUAL.
A public nuisance, *e. g.*, an obstruction in the highway, can be removed when it does not absolutely interfere with travel, only by the town authori-

ties. *Goodsell v. Fleming*, S. C. Wis., Dec. 11, 1883.

57. PARTNERSHIP—LIEN OF PARTNERSHIP CREDITORS UPON FIRM PROPERTY — CONVEYANCE BY PARTNER.

1. When a firm is insolvent th partnership property will be applied to the payment of the partnership debts, and an individual creditor of one of the partners is not entitled to be paid out of such property in preference to partnership creditors. 2. A transfer of the interest of a partner of an insolvent firm to his co-partner, does not enable the assignee, as against the creditors of the firm, to apply the partnership property to the payment of his individual debts. *Roop v. Herron*, S. C. Neb., Nov. 13, 1883; 17 N. W. Rep., 353.

58. PLEADING—VARIANCE.

Under a plea of total failure of consideration, the defendant may prove a partial failure of consideration. *Morgan v. Printup*, S. C. Ga. Dec. 4, 1883.

59. PRACTICE — EXCEPTION — OBJECTION TO EVIDENCE.

An objection to evidence need not be entertained by the court, unless supported by reasons. *Osborn v. Woodford*, S. C. Kan. Jan. 16, 1884.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 85. [18 Cent. L. J. 20.] A sues B in justice's court upon a promissoy note for $30, executed by B to A. B claims that he owes A but $5, and that the note should have been for that amount only; but either through the fraud of A or the mutual mistake of the parties, he made the note for the larger amount, and he desires to tender the amount equitably due, and make the above defense to the suit. Has the justice of the peace jurisdiction to try the issue made by such an answer? If not, would an appellate court of common law jurisdiction have jurisdiction to try the issue upon appeal? or what would be the proper course for B to take in such a case? B.

West Bend, Wis.

Answer No. 1. Justice of the Peace has jurisdiction. Howard v. Mansfield, 30 Wis. 75; Blackwood vs. Jones, 27 Wis. 498. C.

Lincoln, Neb.

Answer No. 2. Fraud in procuring the execution of a contract, is a perfect defence at law, 2 Pars. on Cont. (6 ed.) sec. 767 *et seq*; Bishop on Conts. sec. 213. As to mistakes the rule is, that, material misrepresentations going to the substance of the contract, avoid it, whether caused by mistake or are designed and fraudulent; of course they are a defence to any action on the contract, since they show that there is no such contract as the one sued upon. Mistakes of any other character, not reaching to the very existence of the contract, can only be remedied in equity, 2 Pars. on Cont. sec. 786; Bishop on Cont. sec. 228, *et seq*. From the statement of case I should judge that the amount really due could be tendered and defence at law made before J. P.

JAS. H. BROWN.

Denver, Col.

Query 86. [18 Cent. L. J. 20.] The statutes of Florida allow a jury of six men to try all cases of felony, except capital ones. Is not such a statute in conflict with the Constitution of the United States as construed when adopted? Can the legislative body of any State, constitutionally, curtail the number of jurors to try a felony to any number less than twelve? If so can it not reduce the number to two, or one, as it may see fit? A. C. C.

Sumtervilie, Fla.

Answer No. 1. The statutes of Florida are not in conflict with the Constitution of the United States, because those provisions, touching the right to trial by jury, in United States Constitution, have no application to the several States of the Union. They simply refer to the Federal tribunals. 2 Cow. 815, 7 Wal. 321, and numerous other authorities in the United States Supreme Court Reports. The right of the legislative body of any State, constitutionally, to curtail the number of jurors, to try a felony, to any number less than twelve, depends entirely on the fact, whether or not, there is any State constitutional limitation or prohibition on the plenary legislative power, which is possessed by all State legislatures.

Denver, Col. JAS. H. BROWN.

Answer No. 2. The provisions of the Constitution of the United States as to jury trial in criminal prosecutions, apply to such prosecutions in the Federal courts alone. They are not limitations upon the powers of the States, and the legislatures of the latter may provide for any form of trial they may see fit, not inconsistent with their own constitutions. Twitchell v. Commonwealth, 7 Wall. 321; Murphy v. People, 2 Cow. (N. Y.) 815; Prescott v. State, 19 Ohio St. 184; s. c., 2 Am. Rep. 388; Cooley Const. Lim., 19. However, since the Fourteenth Amendment to the Federal Constitution provides that no State shall "deprive any person of life, liberty or property without due process of law," it is an open question whether any change in a State Constitution made subsequent to the adoption of that amendment, or any similar legislation, even when not in conflict with the State Constitution, would be valid if it abolished jury trial or provided for trial by less than twelve jurors in cases where, at the time of the adoption of the amendment, there was a right to full jury trial. 1 Bish. Crim. Proced., sec. 891. It was probably not intended by the Fourteenth Amendment to restrain the States from making such changes in their forms of judicial procedure as should be found expedient, and it would be a great misfortune if any such construction should be adopted.

Iowa City, Iowa. EMLIN MCLAIN.

NOTES.

——Solicitor Raynor of the Treasury, has rendered a decision to the effect that a woman is not entitled to receive a certificate as captain of a vessell The solicitor has utilized the opportunity afforded by the matter, to scatter one of his usual spread eagle panegyrics this time on the heavenly qualities of woman.